EXHIBIT 1
DATE 3/24/11
HB 205

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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **ROGER DEAN SNAKE,** **Defendant.**	**CR 10-39-BLG-JDS** **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: PROPOSED RULE 414 EVIDENCE**

Comes now, Marcia Hurd, Assistant United States Attorney for the District of Montana and hereby submits its response to the defendant's motion in limine.

The Grand Jury has charged Roger Dean Snake with Aggravated Sexual Abuse and Sexual Abuse of a Minor in violation of 18 U.S.C. §§ 1153, 2241(c) and 2243(a). Snake is alleged to have sexually abused his two step-granddaughters over a period of time between 2008 and March 2010. During the investigation, law enforcement agents interviewed Snake who reported that his daughter had claimed he sexually abused her when she was also a child.

The United States filed a notice pursuant to Rule 414, indicating that it would seek to introduce that evidence at trial. Snake has now moved in limine to preclude the testimony of that witness under Rule 403.

While it is true, under Rule 404(b), that evidence of other bad acts are inadmissible to show propensity, Rule 414 provides that, "[i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for

its bearing on any matter to which it is relevant." Thus, in addition to allowing admission on the basis of the non-character theories of relevance permitted under Rule 404(b), Rule 414 allows the admission of uncharged offense evidence for the purpose of establishing propensity. It is the government's belief that the defendant will attempt to discredit the victims in this case, given their young ages and he and his family's allegations that they are being untruthful.

As the legislative sponsors of Rule 404(b) explained:

> The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b). In contrast to rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant." This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 Cong. Rec. H8991; *see* 140 Cong. Rec. S12990; 137 Cong. Rec.

S3238-41 (further explanation); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Chi.-Kent L. Rev. 15, 18-21 (1994) (further explanation); *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998) ("Under Rule 413 . . . evidence of a defendant's other sexual assaults may be admitted 'for its bearing on any matter to which it is relevant.' . . . Thus, Rule 413 supersedes Rule 404(b)'s restriction and allows the government to offer evidence of a defendant's prior conduct for the purpose of demonstrating a defendant's propensity to commit the charged offense."); *United States v. McHorse*, 179 F.3d 889, 896 (10th Cir. 1999) ("propensity to commit sexual assault or child molestation offenses") (quoting legislative sponsors); and *compare United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (concluding that there is nothing "fundamentally unfair" about the allowance of propensity evidence under Rule 414); *United States v. LeCompte*, 131 F.3d 767, 769-70 (8th Cir. 1997) (abuse of discretion to exclude evidence offered under Rule 414 which was relevant only as to defendant's propensity to commit child sexual abuse; the rule was enacted to overrule the prohibition of propensity evidence in child sexual abuse cases); *United States v. Mound*, 149 F.3d 799, 802

(8th Cir. 1998) (rules' intended effect is to supersede Rule 404(b)'s restriction); *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (Rule 414 allows evidence of propensity); and *United States v. Cunningham*, 103 F.3d 553, 556 (7th Cir. 1996) (Rule 414 makes evidence of prior acts of child molestation admissible without regard to Rule 404(b)).

Although admissible to show propensity, evidence proffered under Rule 414 must still pass Rule 403's balancing test. *LeMay*, 260 F.3d at 1026. Rule 403 provides that relevant evidence may be excluded, among other reasons, if "its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, Fed. R. Evid. In determining whether to admit evidence under Rule 414, this Court should evaluate the following factors:

> (1) the similarity of the prior act to the acts charged;
> (2) the closeness in time of the prior act to the acts charged;
> (3) the frequency of the prior act;
> (4) the presence or lack of intervening circumstances; and
> (5) the necessity of the evidence beyond the testimonies already offered at trial.

LeMay, 260 F.3d at 1027-28. This list is not exclusive.

There are two witnesses who could be called at trial regarding Snake's past sexual abuse of another child. The first is the victim, S., currently age 33. She is Snake's daughter and made reports to law enforcement that he sexually abused her as a child.

The second witness is former Officer James Liegler who investigated the allegations and interviewed Snake's daughter at the time. Applying the *LeMay* factors to the anticipated testimony, the United States submits that the evidence's probative value is not substantially outweighed by the danger of unfair prejudice.

Similarity of prior acts to charged acts:

S. describes activities by Snake which are similar in nature to that alleged by the victims in this case, as well as being more extensive. Both the prior acts and the charged acts show the defendant's sexual interest in related children.

Snake argues that since his sexual abuse of S. is more extensive or severe, these are important differences that go to the similarity prong. That same argument was made in *United States v. Stern*, 2010 WL 3069710, a sexual abuse case in which Judge Cebull admitted Rule 414 evidence of defendant's prior sexual abuse of a sister. That sexual

abuse was more extensive than the trial allegations involving his daughter. The Ninth Circuit noted: "The acts of sexual abuse were quite similar because both cases involved very young female victims who are close relatives of defendant and who were living in his household at the time of the abuse." *Stern* at 1. The Circuit did not parse each type of act with each victim but rather looked at the nature of the age and relationship to defendant.

Closeness in time of prior acts:

Although the sexual abuse of S. took place over 20 years ago, this is not too remote to substantially outweigh the evidence's probative value. In fact, the Ninth Circuit has "declined to adopt an inflexible rule regarding remoteness" in the context of Rule 404(b), which, as set out previously, is more restrictive than Rule 414. *See United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (admitting evidence of a prior act that occurred 13 years earlier); *and United States v. Spillone*, 879 F.2d 514, 519 (admitting evidence of a conviction more than ten years old).

Most recently, Judge Cebull's decision to allow testimony of sexual abuse that occurred 20 years before in a child sexual abuse case was

affirmed by the Ninth Circuit in *United States v. Stern*, 2010 WL 3069710 (9th Cir. 2010). The Ninth Circuit found that the Court did not abuse its discretion in admitting the evidence, allowing the defendant's sister to testify that he had sexually abused her approximately 20 years ago when he was a juvenile. The Circuit noted:

> The acts of sexual abuse were quite similar because both cases involved very young female victims who are close relatives of defendant and who were living in his household at the time of the abuse. The passage of time and the small number of victims are not factors in defendant's favor because there is no indication that he had any similar opportunities to offend target victims of choice, in part because he was incarcerated for a number of the intervening years.

Stern, 2010 WL 3069710 at 1.

Other courts have also admitted evidence of uncharged sexual offenses occurring many years before the charged crime or crimes. *See United States v. Meacham*, 115 F.3d 1488, 1490-95 (10th Cir. 1997) (over 30 years); *United States v. Roberts*, 185 F.3d 1125, 1141-43 (10th Cir. 1999) (ongoing sexually assaultive conduct against numerous victims between 1977 and 1993); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (16 to 20 years before trial); *United States v.*

McDonald, 53 M. J. 593, 594-95 (Navy-Marine Ct. Crim. App. 2000) (15 to 16 years before trial); *United States v. Eagle*, 137 F.3d 1011, 1015-16 (8th Cir. 1998)(10 years); *United States v. LeCompte*, 131 F.3d 767, 768-70 (8th Cir. 1997) (8 to 10 years).

Because the defendant's prior acts are similar to the charged acts, this outweighs any concern as to remoteness.

Frequency of the prior acts:

S. will testify that the defendant sexually molested her on more than one occasion as a child, as will the two alleged victims in this case. Snake's sexual abuse of these three children was not an isolated incident but shows a pattern of sexual abuse over years. He claims that since there have been no other reported victims in the past years, there is no notion of pattern or propensity. That leads one to wonder how many young children it takes to make a pattern? In *Stern*, cited above, it was two. Here, it is three. Because either any other children victimized by Snake have not come forward or he has confined his sexual abuse to only three children does not speak to a lack of pattern.

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Presence or lack of intervening circumstances:

It does not appear that there were any intervening circumstances that would bear on the Court's balancing analysis.

Necessity of the evidence:

The "prior acts" evidence from the witness will be necessary to bolster the credibility of the victims in this case. They were both young when sexually abused by Snake from 2008-2010, and have been cut from their grandmother's family due to the allegations. The defendant has denied the crime, and there is no direct corroborating evidence; consequently, the "prior acts" evidence will be necessary to rebut any suggestion that there is no evidence to corroborate the victim's testimony. *See LeMay*, 260 F.3d at 1028.

Snake alleges that the evidence is not needed by the government since the girls were examined by a medical doctor and an IHS psychologist. However, as the defense knows and will certainly point out in the trial, there is no corroborative medical evidence and the substantive statements made by the girls to the psychologist are not admissible. Snake also alleges that the government will have witnesses to point out that Snake was alone with these two children at his

residence. However, the reality is that, as in the vast majority of the child sexual abuse cases, there is neither corroborating physical or eyewitness evidence to support the children's statements. It will be, as usual, the word of two young children against that of the defendant who vehemently denies the allegation.

Finally, Snake alleges that since he was not convicted of the sexual abuse of his daughter years ago, this evidence is not "highly reliable" as noted in *LeMay*. However, there is no requirement that to be admissible under Rule 414, there must be a conviction - - the test is whether the evidence in highly reliable. Here, Snake's daughter made a specific report about the sexual abuse not long after it happened when she was a child. Snake himself told the FBI Agent, when interviewed, that S. had accused him of sexual abuse years ago. She will be present at trial to present testimony from which Snake can cross-examine her personally about. Because a case was not filed years ago does not mean that the events did not occur, just as Snake's daughter will testify they did.

Although the "prior acts" evidence is undeniably prejudicial, it is not unfairly so because it is highly relevant. *See LeMay*, 260 F.3d at

1027-28. The evidence shows exactly what Congress noted in enacting Rule 414 - - "that the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant.' This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense."

The evidence should be admitted.

DATED this 14th day of October, 2010.

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/s/ Marcia Hurd
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Assistant U.S. Attorney
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response is in compliance with Local Rule 7.1(d)(2) (as amended) and CR 12.1(e). The brief's line spacing is double spaced, with a 14 point font size and contains less than 6,500 words. (Total number of words: 2097, excluding tables and certificates).

DATED this 14th day of October, 2010.

/s/Marcia Hurd
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